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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

78-1211

DR. LANDRUM TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No.**DR. LANDRUM TUCKER,***Petitioner,**v.***UNITED STATES OF AMERICA,***Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

RULINGS BELOW

This is a petition for writ of certiorari from a judgment entered January 5, 1979 by the U.S. Court of Appeals for the Sixth Circuit denying petitioner's timely Motion for Rehearing filed November 27, 1978. That Motion sought rehearing of the Court's Order of October 16 affirming petitioner's conviction under 18 U.S.C. 1621. Copies of the Court's decision of January 5, 1979¹ and October 16, 1978² are appended to this petition.¹

¹ Appendix filed with this Petition ("App."), p. 36a.

² App 30a.

JURISDICTION

Jurisdiction of this Court is founded on 28 U.S.C. 1254(1); this is a petition seeking review of a judgment of the U.S. Court of Appeals for the Sixth Circuit entered on October 16, 1978 affirming a conviction of U.S. District Court for the Middle District of Tennessee, Nashville Division. The judgment of the Court of Appeals did not become final until that Court's Order denying petitioner's timely Motion for Rehearing, such Order being dated January 5, 1979.

INTRODUCTION

On October 15, 1970, the Organized Crime Control Act of 1970 was signed into law by President Nixon. Prominent among the strong anti-crime provisions which became law that day was Title IV, the anti-perjury provision. The Department of Justice commented:

"... Title IV would create a new federal crime dealing with false statements before courts or grand juries"³

and added that:

"the common law rules of evidence applicable to perjury prosecutions would not be applicable to it."⁴

A prominent feature of this "new federal crime" was subsection (d):

"(d): Where, in some continuous court or grand jury proceeding in which a declaration is made, the

person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed."⁵

The plain purpose of this provision is obvious. The House Report states:

"The recantation or retraction provision is modeled upon a N.Y. Penal statute (N.Y. Penal Law 210-25). It serves as an inducement to give truthful testimony by permitting him to correct a false statement without increasing the risk of prosecution by doing so."⁶

That is what Congress intended. This case is the first test of the scope of that statute to come before this Court. As such, it is important to set out just how far the rulings below strayed from clear Congressional intent.

Six years and seven months after October 15, 1970, on May 25, 1977, Dr. Landrum Tucker, a practicing psychiatrist on the faculty of the University of North Carolina Medical School, sat in the witness box in the courtroom of Judge Frank Gray, Jr., U.S. District Court Judge for the Middle District of Tennessee, Nashville Division. Dr. Tucker was a witness called by the defense that day in a bail hearing, ostensibly to determine whether one David Burks (whose conviction for bank robbery had been reversed by the Sixth Circuit Court of Appeals) should be admitted to bail pending a new trial or other disposition in this case. In cross examination by the Assistant United

³Department of Justice comments on § 30; the Administration bill, *Hearings Before the Subcommittee on Criminal Laws & Procedure on Measures Relating to Organized Crime*, Senate Judiciary Committee, 91st Congress, 1st Session, p. 379.

⁴*Ibid.*

⁵Now 18 U.S.C. 1623(d), App. 27a.

⁶House Report 91-1549, 91st Congress, 1st Session, 197 Cong. Code Service, Vol. 2, p. 4024.

States Attorney, Dr. Tucker was asked whether he had brought with him letters written to him by Burks, the Defendant. Dr. Tucker first answered that he did not, that the letters were in a briefcase in his Chapel Hill office. On the next page of transcript, sixteen lines following the response, forty seconds after Dr. Tucker's answer by the most conservative count, forty seconds in which nothing occurred which threatened exposure of the falsity of his earlier answer. Dr. Tucker recanted as follows:⁷

"Uhm, your honor, I would like to take that back.
I do have the letters with me."

Nine lines and two questions later the Court recessed for Dr. Tucker to get the letters which were in a briefcase in Burks' lawyer's car outside the Nashville Courthouse. Immediately upon resumption of the hearing they were delivered to the Assistant U.S. Attorney.⁸ The proceeding before Judge Gray was delayed ten minutes. Its outcome was totally unaffected by what had just transpired.

Dr. Tucker sat in a federal court and acted under the precise inducement Congress enacted into law to discourage perjury before Federal Court. What then happened is precisely what Congress intended *not* to happen. For his pains, Dr. Tucker was indicted, tried, and convicted of perjury for his sixteen line, forty second, lapse that could not, and did not affect the outcome of the May 25 bail proceeding one whit. Not only was the purpose of the new statute flouted; so were its words: When Dr. Tucker recanted, the exposure of

the falsity of his misstatement was not only *un-* "manifest," not one cloud had been thrown on it before he acted to recant voluntarily.

The scenario in this drama then shifted to the U.S. Court of Appeals for the Sixth Circuit. After sitting on this case for six months after argument, that Court affirmed.⁹ They did so by literally retrying the case; its affirmance was based on explicit findings of fact by that appellate court, totally apart from any facts or issues submitted to, or ever considered by the jury.

There were two victims of all of this. This Petitioner was the human victim. But just as thoroughly victimized was an Act of Congress, literally written out of the law by the Courts below in this case.

QUESTIONS PRESENTED FOR REVIEW

- (1) May a federal prosecution for perjury which occurred before a federal court lawfully proceed under 18 U.S.C. 1621 in face of specific Congressional intent to prosecute perjury in such proceedings under 18 U.S.C. 1623?
- (2) Does the recantation provision found in 18 U.S.C. 1623(d) apply to the recantation in this case?
- (3) If Congress directed prosecution under 18 U.S.C. 1623 of perjury occurring in a federal Court proceeding, is conviction under subsection (d) of that statute lawful when a recantation is made within seconds of the preceding misstatement so that the misstatement could not, did not, substantially affect the proceeding? Alternatively, is such a conviction lawful under that subsection

⁷The entire colloquy is set forth at App. 17a.

⁸App. 21a.

⁹The Court of Appeals opinion is at App. 30a. Its denial of the Motion for Rehearing is at App. 36a.

if such recantation was made when it was not manifest that such a falsity (of the proceeding misstatement) has been or will be exposed?

(4) Assuming, *arguendo*, that Congress did not direct prosecution under 18 U.S.C. 1623 for perjury occurring in federal court proceeding, is a conviction under pre-existing 18 U.S.C. 1621 lawful following a recantation which occurred within seconds of the original misstatement?

(5) Assuming, *arguendo*, that Congress did not require prosecution under 18 U.S.C. 1623 for perjury occurring in a federal court proceeding, is a conviction under pre-existing 18 U.S.C. 1621—or under new 18 U.S.C. 1623—lawful when such alleged perjury occurred in a proceeding that was legally moot?

(6) May a United States Court of Appeals properly affirm a conviction on new and independent grounds of its own wholly unsupported by facts in the record below, on issues never considered by the jury below?

FACTS

A. The Bail Proceeding on May 25, 1977

David Burks had been convicted of bank robbery in the Middle District of Tennessee. On appeal, the Sixth Circuit reversed that conviction.¹⁰ Burks remained incarcerated, however, and was in the Nashville jail on the morning of May 25, 1977. The hearing before U.S. District Court Judge Frank Gray was to determine whether Burks would be admitted to bail pending retrial or further disposition of his case.

¹⁰The Burks case has been the subject of a separate proceeding before this Court, *Burks v. United States*, ____U.S____, 57 L.Ed.2d 1, 98 S.Ct. ___, 1978.

Concurrently, the Ohio authorities were seeking to prosecute Burks for violation of his parole from an earlier bank robbery conviction. The thrust of this parole violation was Burks' possession of a weapon in the Tennessee bank robbery for which he had been convicted, with this subsequent conviction now reversed. Pending against Burks on May 25, 1977 was a parole violation warrant issued by the Ohio authorities. It was the subject of a separate proceeding in the Nashville Court.¹¹ Because of it, there was no way that Burks could be freed on May 25, 1977 even if Judge Gray had admitted him to bail pending disposition of Burks' Nashville conviction. Indeed, Judge Gray opened the May 25th proceeding by questioning whether the entire proceeding before him was moot.¹² That question was never resolved.

Determining to proceed with the bail hearing notwithstanding the cloud of mootness over the entire proceeding, Judge Gray then heard the testimony before him. Dr. Tucker, Petitioner herein, had been an expert witness at Burks' earlier Nashville trial. He was now called by the defense for testimony on Burks' emotional condition, as it bore on the issue of bail. It was during cross examination of Dr. Tucker by the Assistant U.S. Attorney that the colloquy giving rise to the perjury prosecution occurred. The entire colloquy, from the initial denial that his correspondence with Burks was with him to Dr. Tucker's recantation, covers a span of forty seconds if read at fifth grade speed.¹³ Immediately upon recantation, Judge Gray adjourned for production of the missing

¹¹Docket Number 75-246-NA-CR in the same Court, see App. 12a.

¹²App. 17a.

¹³App. 21a.

letters. They were produced within the ten minute recess and just as immediately turned over to the Assistant U.S. Attorney. Justice in that Nashville Courtroom was not interfered with. Judge Gray, months later, denied bail without reference to this episode and indeed without opinion. The proceeding in that Nashville Court was delayed ten minutes. That is the full impact of what petitioner did.

Because the Sixth Circuit Court of Appeals in a voyage of its own determined that what occurred during those forty seconds made the likelihood of exposure of the falsity of Dr. Tucker's initial statement manifest,¹⁴ this point requires mention. The last question (unanswered) to Dr. Tucker—before his recantation—was:

"Why are the letters in your briefcase in North Carolina?"

One can speculate for a thousand hours over what the answer to that question might have been. Then one must speculate for another span over what the next question might have been. Prior to both, it seems clear that absolutely nothing was "manifest"—at that juncture even if this was the proper test under Section 1621 (which it was not), and even if the jury below had ever heard of this issue—which it had not.

One other aspect of the May 25th episode requires mention. Immediately after his recantation Dr. Tucker apologized to the Court for what had occurred.¹⁵ Throughout this case he has taken the uniform position that what he did on the stand is not blameless. No one who utters a false statement in Federal Court is blameless,

as the Petitioner recognizes. There are ample remedies available and appropriate to what occurred: censure or even contempt. But what occurred was not perjury, either historically, or under the old federal statute (18 U.S.C. 1621) or the new federal statute 18 U.S.C. 1623.

B. Prosecution Before the Trial Court

Shortly thereafter Dr. Tucker was indicted for perjury. The indictment dealt exclusively with the nineteen lines of testimony described hereinabove and is set forth in *haec verba* in the appendix.¹⁶ The indictment was framed, however, under 18 U.S.C. 1621, the old federal perjury statute whose substantial modification—in so far as perjury occurring before federal courts was concerned—was the specific purpose of Congress' enactment of Title IV of the Omnibus Crime Act of 1970, now 18 U.S.C. 1623.¹⁷

The rectitude of permitting the prosecution to indict under the old statute was raised by predecessor counsel in a pre-trial motion before U.S. District Judge Morton (who tried the case below), who denied the motion on July 5th, 1977.¹⁸ On July 8th and 9th, Dr. Tucker was tried for perjury in a jury trial before Judge Morton. Judge Morton's instructions to the jury were not an issue in this cause until after the Court of Appeals' ruling; they became so when that Court made independent findings of fact regarding "manifest" exposure of Dr. Tucker's initial false statement concerning the location of the Burks' correspondence when he recanted. No such issue

¹⁴ App. 31a.

¹⁵ App. 22a.

¹⁶ App. 26a.

was placed before the jury by Judge Morton, whose instructions to the jury did not deal specifically with recantation or its consequences.¹⁹

On July 9th, after a two day trial, Dr. Tucker was found guilty by the jury. Predecessor counsel filed a Motion for Judgment of Acquittal which was denied on July 15th. Present counsel appeared in the cause commencing August 1st. Thereafter, a Motion to Reconsider the Court's earlier denial of July 15th was filed. It raised the grounds which have been urged since: (1) It was error for Dr. Tucker to be tried under 18 U.S.C. 1621 because Congress intended that section to be supplanted by 18 U.S.C. 1623 (Title IV of the Omnibus Crime Act) in cases of perjury before a federal court; (2) It was error to indict Dr. Tucker for perjury arising out of the May 25th proceeding because that proceeding was legally moot; (3) Even if old Section 1621 did apply in this case, Dr. Tucker's immediate recantation was a complete defense as a matter of law. After briefing and argument Judge Morton denied all motions on September 23rd, and Dr. Tucker was sentenced that day.²⁰

C. The Appeal

On appeal Dr. Tucker pressed the same arguments. Argument was held on April 20, 1978 before the U.S. Court of Appeals for the Sixth Circuit. Six months and seven days later that Court affirmed. Its cursory, two-page opinion did not deal with the issue of Congress' intent to supplant Section 1621 with Section 1623 in cases of perjury before federal court. The Court did hold

¹⁹The instructions on this point are set forth at App. 30a.

²⁰App. 4a.

that (1) the proceedings on May 25th, 1977 were not moot and (2) that recantation was the chief appellate argument and that:

"Assuming, without deciding, that such a defense may be appropriate under Section 1621, we nonetheless find on this record that the defense of recantation is rebutted by the fact that while recantation occurred quickly, it also occurred under a threat that made it manifest that the falsity would be exposed."²¹

Dr. Tucker, on November 24th, 1978²² filed a timely Petition for Rehearing before the Sixth Circuit. That petition dealt with the singular departure made by that Court from the record before the trial court. It pointed out that there was not one fact in the record below supporting the appellate court's new and independent finding of fact that recantation occurred under a "manifest" threat of exposure of falsity. The Petition further asserted that the prosecution had never raised the point at trial and the jury never considered it. Moreover, the test used by the Court employed language from new Section 1623 while rejecting Dr. Tucker's argument that Section 1623—not Section 1621—was the controlling statute in this case. To complete this appellate sleight of hand, the Sixth Circuit ignored the vast difference in recantation rules between new 1623 and old 1621, using 1623's language while ruling simultaneously that Section 1623 did not apply. Finally, the Petition argued that whatever else the Court had done, it had written recanta-

²¹App. 31a.

²²On October 27, 1978 petitioner moved the Court to extend the time for filing a Petition for Rehearing. The Court did so, extending the period through November 30, 1978. The Petitioner's Petition for Rehearing was filed November 27, 1978.

tion out of the federal law of perjury. That, the Petition argued was the true result no matter what statutory framework the Court chose to settle on. That, the Petition argued, made Title IV of the Omnibus Crime Act (Section 1623) a trap that had sprung on Dr. Tucker. Such a trap, the Petition argued, was why Congress enacted Section 1623: to insure that immediate recantation would not ensnare the recanter. Yet it had done that very thing in this case.

On January 5th, 1979 the Court denied the Petition for Rehearing, commenting that "no issue of substance [was] presented which was not taken fully into account prior to issuance to the Court's Order."²³

REASONS FOR GRANTING THE WRIT

A. The Major Federal Statute Involved in This Case, the Anti-Perjury Provision of the Omnibus Crime Control Act of 1970 (18 U.S.C. 1623) Has Never Been Interpreted by This Court. Unless It Is Interpreted in This Case, the Rulings Below Will Nullify a Principle Congressional Policy of That Enactment, viz., Encouragement of Immediate Recantation of Perjurious Testimony Uttered Before a Federal Court.

1. This is a benchmark case.

Title IV of the Omnibus Crime Control Act of 1970 (the "Omnibus Crime Act") contains Congressional policy on modification of federal perjury law. Like every other part of that act, it is a tough anti-crime provision,

²³App. 36a.

eliminating outmoded evidentiary provisions that impeded prosecutions. One such modification was elimination of the two-witness rule which as part of old Section 1621, the pre-existing perjury statute. Simplifying prosecution for perjury was but one of the Congress' weapons. Subsection (d) of new Section 1623 embodied another: it provided an inducement for quick retractions of perjury before federal courts and grand juries. If such a retraction was made before the false statement "substantially affected the proceeding," or was made before it had "become manifest that such falsity has been or will be exposed," the retraction constituted a complete defense. Whereas the law of retraction under old Section 1621 was complicated with differing Court interpretations, the new retraction rule was simple and complete. It provided a complete defense under the conditions prescribed by 1623(d).

It was clear that the inducement to recant was just as much a part of Congressional policy against perjury in this tough anit-crime act as was the easing of evidentiary rules for prosecution of perjury.

That policy, and the statute that sets it forth, are before this Court for review for the first time.

2. The rulings below nullify the Congressional policy found in Section 1623(d).

(a) The rulings nullify Title IV of the Omnibus Crime Act.

For the first time, this Court is called upon to determine whether the Congressional policy in enacting this anti-perjury statute can be nullified by whim of an individual prosecutor. For what occurred at the indictment stage of prosecution below was simply this: faced with a

retraction that clearly created problems under Section 1623, the prosecution determined simply to ignore the statute and to prosecute under Section 1621, the old federal statute which spawned the problems impelling Congress to enact Section 1623. By prosecutorial whim in this case the two-witness rule, Section 1621's unwanted baggage, was revived for perjury which occurred in a federal court. And by prosecutorial whim the inducement to recant, specifically put into the law by Congress in Section 1623(d), was written right out of it. Congress specifically interdicted both of these results in the Omnibus Crime Act. Yet this was done in a case where the alleged perjury had occurred before a federal court, the very locale in which Congress clearly ordered prosecution under new Section 1623. In consequence, the entire legislative purpose of Title IV of the Omnibus Crime Act has been nullified in this case, and will be nullified recurrently in those future cases where the prosecution chooses to ignore Section 1623's rules. This result is inevitable under the ruling below.

(b) This result requires review by this Court.

It is essential to note that the question posed herein is not whether Section 1623 was properly applied. The question is more fundamental. The prosecution chose to ignore Section 1623 completely. The question, therefore, is whether the language of the provision and its clear policy permit this.

Although Congress was very clear in its intent with regard to the substance of the new perjury law, it was not as explicit as to the fate of the old statute. There is no specific language of repeal of the old Section 1621; nor should there be, because that statute obviously remains alive for use where perjury occurs *outside* of federal

courts and grand juries. It may be used today to prosecute false statements made under oath in the thousand contexts existing outside of federal courts and grand jury rooms. But it is the essence of uselessness for Congress to enact a provision as clear as Section 1623, to state just as explicitly that it is to apply to perjury which occurs before federal courts and grand juries, and then to permit the Section to be totally ignored in those very cases—when the prosecution so chooses.

Moreover, this Court's oft-repeated strictures against repeal by implication do not apply here. New Section 1623 covers a more limited and more specific form of criminal conduct—that of false statements before federal courts and grand juries—than does Section 1621. Thus both provisions can operate concurrently as Congress intended them. But to achieve that harmonious result, it is necessary to give Section 1623 the effect that Congress intended it to have, viz., sole coverage of the crime of perjury when it occurs before the federal courts or grand juries.

The legislative history of Section 1623 is quite clear on that point. The assistant Attorney General, in describing the new enactments, stated:

"Title IV would create an additional felony provision for perjury or subordination of perjury before a court or grand jury. The theory behind this proposal apparently is that since a new offense is created, the old common law rules of evidence applicable to perjury prosecutions generally, the two-witness and direct evidence rule, would not be applicable to the new offense."²⁴

²⁴ Statement of Assistant Attorney General Wilson, *Hearings Before Subcommittee on Criminal Law & Procedure Relating to Organized Crime*, 379.

Clearly that purpose is wholly subverted if Section 1621 can be substituted at will for the new felony provision. The departure from Congressional intent is even more graphic if legislative language supporting the retraction provision is examined:

"It seems as an inducement to the witness to give truthful testimony by permitting him to correct a false statement without increasing the risk of prosecution by doing so."²⁵

This Congressional concern will be totally nullified if the rulings below are permitted to stand. For if they do, Congress will have enacted a trap to lure the unwary. Induced to recant perjury by the clear words of Section 1623(d) the recanter will then be indicted under 1621 as was Dr. Tucker. Far from suppressing perjury, Section 1623 will simply act to intimidate witnesses against recantation. Effectiveness of the federal perjury laws will be substantially set back, rather than enhanced by Congress' enactment—if the rulings below are allowed to stand.

(c) *The need for review by this Court is emphasized by the applicability of Section 1623(d) to the instant case.*

Although the issue is a more fundamental one involving avoidance of Section 1623 by the prosecutors, it is essential that Section 1623(d)'s applicability to this case be clear. And it is. No one can read those nineteen lines of testimony before a federal court (and what immediately followed) without concluding that the outcome of the bail hearing could not be influenced by the episode, or that prior to Dr. Tucker's voluntary retraction he was under no "manifest" threat of exposure.

²⁵ House Report 91-1549, 91st Cong., 1st Session, 197 Cong. Code Service, Vol. 2, p. 4024.

Section 1623(d) was written to cover situations such as this one. That is why the prosecution preferred not to use it.

B. There Exists a Conflict in Views Among Courts of Appeal on the Issue Raised by the Case.

In this case the Sixth Circuit has clearly rejected Petitioner's contention that it was error for the prosecution to proceed under Section 1621 in face of clear Congressional intent that perjury in federal court proceedings, following passage of the Omnibus Crime Act, be prosecuted under Section 1623. This question and the corollary question of when Section 1621 should now be used have been raised in three other circuits. The result has been a conflict in views articulated by the courts; even if one of the conflicting views is plainly dicta, the confusion in the circuits regarding these two sections justifies review by this court.

The Second Circuit in the Teleprompter Case (*United States v. Kahn*, 472 F.2d 272, U.S.C.A. 2, 1973) was faced with the exact argument raised by the Petitioner below, viz., that Section 1623 supplanted 1621 in federal court proceedings. The Government in that case argued that the prosecution had unfettered discretion to choose the statute on which to prosecute, the position of the prosecution in the case at bar. The court commented (at 283):

"In response, the Government claims that Section 1623 did not repeal Section 1621, and that the prosecutor has the absolute discretion to choose which section an alleged perjurer will be tried under, and consequently what evidentiary rules will apply to his trial. While it is clear that Section 1623, which applies only to Grand Jury and Court proceedings, did not wholly replace Section 1621,

which covers oaths before any "competent tribunal, officer or person," we admit great skepticism about the second half of the government's argument. While perhaps Congress constitutionally could have placed such wide discretion in the prosecutor, we find no clear indication that it means to do so here, and we find not a little disturbing the prospect of the government employment of Section 1621 whenever recantation exists and Section 1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position."

Because the case was decided on other grounds, this language so tellingly applicable to *Tucker* is dicta, but does contain a pointed observation at the difficulties persisting in the law of perjury, absent clarification by this Court.

The obverse side of the coin was argued by the Defendant before the Seventh Circuit in *United States v. Devitt*, 499 F.2d 135, U.S.C.A. 7, 1974, where the Defendant contended that Section 1621 (with its heavy evidentiary burden imposed on the prosecution) should have been the basis of the prosecution, rather than Section 1623, which actually was used in the case. The Court stated (at 139):

"Defendant cites no case in support of the novel proposition that where conduct is proscribed by two or more separate criminal statutes, the government must elect to prosecute under the statute imposing the greater burden of proof If anything, the government would be expected to proceed under Section 1623 rather than Section 1621 on the ground that a statute aimed at specific conduct prevails over an otherwise applicable general statute [citing *United States v. Kahn*, *supra*]."

In *Devitt*, the 7th Circuit held that the prosecution under Section 1623 was appropriate.

"on the ground that a statute aimed at specific conduct prevails over an otherwise applicable general statute."

This view is disputed by the Sixth Circuit judgment in the case at bar.

The implication that Section 1623 was the proper sanction for the court-originating perjury was also articulated in the Third Circuit in *United States v. Lardieri*, 497 F.2d 317 U.S.C.A. 3, 1974.

[At 320]: "When Congress enacted the portion of the Organized Crime Control Act of 1970 now codified as Section 1623 involved in this case, it confined its operations to false declarations before grand juries and courts. The requirements for a conviction were relaxed from that of the previous perjury statute, perhaps influenced by the considerations that the necessity for encouraging truthful disclosures in court-supervised proceedings was more compelling than in other settings and that the means for preventing abuse of statute were more readily available."

That language loses all meaning if the prosecution can proceed at will under Section 1621 in cases involving perjury before federal courts. It is, accordingly, directly in conflict with the ruling of Sixth Circuit in the case at bar.

Fairly stated, confusion and dispute exist between the Sixth Circuit and other circuits regarding the present function of Sections 1621 and 1623. That confusion has been focused in a clearly defined issue by the rulings below in this case. Review by this Court is justified on this ground.

C. Assuming, *Arguendo*, That It Was Proper for Prosecution To Proceed Under Section 1621 in This Case, the Rulings Below Eliminated a Defense Historically Available in Perjury Prosecutions. They Further Permitted a Perjury Prosecution To Arise from a Legally Moot Proceeding. Such Action Requires Scrutiny by This Court.

1. *Throughout the history of the crime of perjury, there has never been a case in which a retraction as immediate as this one was followed by conviction.*

As Petitioner argued before the Sixth Circuit, this case is unique. From 1827, when Lord Coke first defined perjury, through the ensuing 152 years there is no case like it. There has never been a single case reported in England or the United States where an immediate retraction, occurring within seconds of the false declaration, did not bar prosecution. Counsel has searched the history of the law, both at the Common law and under American statutes (including the old federal perjury statutes) and has found none.

Thus it is that Petitioner may argue with force that the rulings below in this case substantially change the federal law of perjury even if the law (after enactment of Section 1623 in 1970) permits prosecutions to proceed under Section 1621 where the misstatement occurs in a federal court proceeding.

The rules governing retraction under 1621 were at best murky. *Norris v. United States*, 300 U.S. 564, 81 L. Ed. 808; 57 Sup. Ct. 535 (1937), in finding the defense of retraction inapplicable to the specific factual situation, enunciated general principles which have been

variously interpreted by federal courts. One court held that an immediate retraction caused:

"the false statement and its withdrawal . . . to constitute one inseparable incident out of which intention to deceive cannot be drawn"; *Llanos-Senarillos v. United States*, 177 F.2d 164 (1949, C.A. 9)

or, in another case, more generally that the retraction negated the requisite criminal intent without further specification (*Beckanstin v. United States*, 232 F.2d 1, C.A. 5, 1956), or in a third, that retraction is a factor which might result in the perjurious statements having a

"flimsy . . . base on which to predicate so serious a charge as that of perjury"; *Bizar v. Bendix*, 285 F. 974 (U.S.C.A. D.C., 1923).

The additional requirement that the misstatement be material (see *United States v. Whimpy*, 531 F.2d 768, C.A. 5, 1976) required for all federal perjury prosecutions (whether or not involving retraction) poses particular problems when the retraction was immediate. Because of the proliferation of rules dealing only tangentially with retraction, Congress wisely acted to clarify the law by enacting Section 1623(d). But under pre-existing law, no matter which of the slightly variant rules is followed, this Court has recognized that retraction is a defense under Section 1621.²⁶ In the case at bar retraction under any of the interpretations would properly constitute a complete defense.

²⁶ *U.S. v. Norris*, 300 U.S. 564, 81 L.Ed. 808, 57 Sup. Ct. 535 (1937); *Bronston v. U.S.*, 409 U.S. 532, 34 L.Ed.2d 588, 93 Sup. Ct. 395 (1973), holding the common law decisions on perjury applicable to Section 1621.

The Sixth Circuit, in the prosecution under 1621, felt otherwise. In so ruling it made a substantial change in the federal law under that statute, a departure again at odds with either federal rulings under Section 1621, the law prior to Section 1623. Review by this court is thus justified even if Section 1621 is to continue to apply to prosecution for perjury occurring in federal courts. Absent such review, the law of perjury—under either statute—has had the defense of recantation peremptorily removed.

2. This case arose on a legally moot proceeding, and will, if unreviewed, broadly change federal perjury law.

At the beginning, and at the end, of the proceeding before Judge Gray on May 25th, 1977,²⁷ the Court questioned whether the proceeding before him was moot. Certainly at its close the issue before the Court, the release of David Burks from custody, was resolved by events outside of that courtroom which the events within it could not touch. The events outside the courtroom were those of the parole violation proceeding, out of which a detainer for Burks had been issued by the Ohio authorities, a proceeding which had a judicial identity (a docket number and wholly separate procedures) all its own, requiring the return of David Burks to jail on May 25, 1977 no matter how Judge Gray ruled.

Among the more serious defects in a moot proceeding is what to do about false statements which occur within it. Starting from Blackstone, common law courts held that:

"In order to constitute perjury the false statement must be made in a proceeding before a Court,

agency or official having jurisdiction to inquire into the matter which was the subject of the proceeding" (4 *Blackstone Commentaries* 137, 1825 Edition), quoted in *Gatewood v. State of Maryland*, 290 A.2d 551, 553.

That requisite jurisdiction is placed under a dissipating cloud if the proceeding is a moot one. In a series of cases, both federal and state, the various procedural defects undercutting perjury prosecutions have been outlined. See *West v. United States*, 258 F. 413, 416 (U.S.C.A. 6, 1919); *United States v. Crawford*, 395 F. Supp. 800 (U.S.D.C. W.D. Pa. 1975); *People v. Brophy*, 120 P.2d 946 (D.C.A. C.A. 1942); *People v. Hebbard*, 162 N.Y.S. 80 (S.C.N.Y.C. 1916); *Myers v. United States*, 171 F.2d 800 (U.S.C.A. D.C., 1948); and *Etheridge v. Slate*, 175 S.W. 702 (Court of Criminal Appeals, Texas, 1915). One such defect is the absence of a "writ of entry forming the basis for the testimony," *State v. Hanson*, 39 Me. 337, quoted in *West v. United States*, *supra*, such absence destroying—in non-technical terms—the legitimate purpose of the proceeding. Certainly the question of permitting prosecution for as serious a federal felony as perjury, arising out of a proceeding as questionable as the May 25th, 1977 hearing, a proceeding thrown under a cloud of mootness by the presiding Judge himself, justifies the scrutiny of this Court.

In sum, the federal law of perjury was greatly changed by the ruling below in this case, without regard to the threshold question of whether the prosecution proceeded under the wrong statute. A federal perjury conviction totally unlike any other in the history of the crime, which, additionally, grew out of a proceeding that was then moot are, indeed, prudent issues for review.

²⁷App. 17a.

D. The Court of Appeals Retried This Case in a Departure from Proper Appellate Procedures.

The heart of the judgment of the Court of Appeals (entered October 16, 1978) is the following sentence:

"Assuming, without deciding that such a defense may be appropriate under Section 1621, we nevertheless find on this record that the defense of recantation is rebutted by the fact that while recantation occurred quickly, it also occurred under a threat that made it manifest that the falsity would be exposed."²⁸

This remarkable decision deserves review by this Court in its supervisory function over the processes of appellate justice in the federal courts.

1. There is nothing in the record to support the new and independent finding of fact made by the Court of Appeals

Earlier, the sole question put to Dr. Tucker after his misstatement and before his recantation bearing in any way on the misstatement was set out. It was:

"Q. Why are the letters in your briefcase in North Carolina?"

That is the sole question (unanswered by Dr. Tucker) even faintly relevant to the appellate court's new and independent finding regarding exposure. We submit that even if the appellate court used the proper test under Section 1621 (which it did not²⁹), and even if the jury below had considered this issue (which it had not), all

that was "manifest" (when Dr. Tucker recanted) was the prosecutors desire to find out why the documents had been left in Chapel Hill. That Court (and this Court) can speculate endlessly as to what Dr. Tucker might have answered to the one question above. It is further speculation whether the prosecution would then follow this line. It is the ultimate speculation as to whether the prosecution would then follow this line to secure an admission, or create a trap from which no escape was "manifest." No Court in the land would permit a jury to speculate on the issue of whether this Defendant's misstatement would be exposed by this single unanswered question, and the infinite variety of questions and answers that could, conceivably, have followed.

Yet it is that one unanswered question which constitutes the entire evidentiary base for the appellate court's new and independent finding of fact in this case. And that new and independent finding of fact is the basis of that appellate court's judgment.

2. The test used by the Court of Appeals was different from that used by the jury.

In an earlier section, recantation law under old Section 1621 was delineated. Various factors were used by federal courts in determining whether recantation became a full defense in a particular case. Proximity in time to the original misstatement,^{29A} whether recantation negated criminal intent,³⁰ whether recantation made the entire episode immaterial, whether the outcome of the proceed-

²⁸App. 31a.

²⁹"Manifest" is drawn from Section 1623, held inapplicable by the same Court.

^{29A}*Llanos-Senarillos v. United States*, 177 Fed. 164 (1949, C.A. 9).

³⁰*Beckanstin, supra*, p. 21.

ing could be influenced by the false statement³¹ all are tests existing under the law prior to enactment of Section 1623.

It is only when Congress enacted Section 1623 that the test of recantation became whether it was "manifest" that the falsity would be exposed. The new test is obviously quite different from the plethora of tests used under older statute. Yet the appellate court in this case plainly used the "manifest" test under Section 1623 while, at the same time, ruling that the prosecution under old 1621, not 1623, was proper.

3. The test used by the Court was incorrectly applied.

Adding to the litany of error, the Court of Appeals not only used the test from Section 1623(d) (while rejecting that statute's applicability to this case), but applied it incorrectly. The test for validity of recantation—if one is to use the "manifest" threat of exposure yardstick—is in the disjunctive. A recantation is valid if (at the time of recantation) *either*:

"the declaration has not substantially affected the proceeding," or

"it has not become manifest that such falsity has been or will be exposed."

Use of the "manifest" test, alone, as the Court did, simply ignored the alternative test by which a recantation becomes valid. The alternative test is telling in this case: it is totally clear that the false declaration did not and could not affect the outcome of the proceeding at the point—40 seconds later—when Dr. Tucker recanted. In terms of the administration of appellate justice, appellate deletion of this latter test removes the appellate court's

³¹ *United States v. Whimpy, supra*, p. 21.

judgment from the traditional purpose of perjury prosecutions, protection against the improper influencing of judicial proceedings by false testimony.

4. This issue on which the Court of Appeals made its finding of fact was never considered by the jury below; the Petitioner was therefore denied a jury trial on this issue.

No evidence was offered by the prosecution on the issue of recantation at the July 8-9 trial of Dr. Tucker. The trial Court, in its instructions gave not one clue to the jury that anything relating to recantation—let alone whether it came under threat of exposure—was before the jury to decide. The Court's instructions on Section 1621 are set out in their entirety in this appendix.³² First the Court outlined the three elements of perjury.³³ Recantation was not mentioned. Next the Court defined specific intent.³⁴ Again recantation was not mentioned. But then predecessor counsel to Dr. Tucker pressed the Court for a more specific instruction on recantation, but this was denied. The colloquy of denial, and the following additional instruction actually given (again never mentioning recantation) are all set forth *in haec verba* in the Appendix.³⁵

Thus the jury never received an instruction that even mentioned recantation or referred to it. The jury never knew what recantation was, nor when it became a defense when the case was placed in the jury's hands for verdict. Accordingly the jury never considered any

³² App. 32a.

³³ App. 32a.

³⁴ App. 32a.

³⁵ App. 33a.

aspect of the recantation made by Dr. Tucker and certainly did not consider any "manifest" threat of exposure that may have existed when Dr. Tucker recanted.

What the appellate court did in its review was to retry the case, making a new and independent finding of fact on an issue never considered by its jury. To do so plainly constitutes a deprivation of Dr. Tucker's right to a jury trial on the issues in his case. Furthermore that denial occurred on issue palpably crucial to the appellate court's judgment.

The principle violated is rudimentary to our system. In *Security Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87 L.Ed. 626, 63 Sup. Ct. 454 (1942), this Court stated:

[At 88]: "But it is also familiar appellate procedure that where the correctness of the lower Court's decision depends upon a determination of fact which only a jury could make but which has not been made, the Appellate Court cannot take the place of a jury."

and in *Kelly v. Everglades District*, 319 U.S. 415, 87 L.Ed. 1485, 63 Sup. Ct. 1141 (1942), this Court put in different words the same meaning:

[At 421]: ". . . for it is not the function of this Court to search the record and analyze the evidence in order to supply findings which the trial Court failed to make."

Any curtailment of a litigant's right to a jury trial has always been a major reason for review by this Court. See *Beacon Theatres v. Westover*, 359 U.S. 500, 501, 3 L.Ed.2d 988, 79 Sup. Ct. 948 (1959); *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500 at 510, 1 L.Ed.2d 764, 77 Sup. Ct. 808 (1957); *Wilkerson v. McCarthy*, 336 U.S. 53, 64, 93 L.Ed. 497, 69 Sup. Ct. 413 (1949).

CONCLUSION

This case is unique in the history of perjury. Never has an immediate retraction been ignored by the Courts. It is unique, too, in the damage it does to the policy and language of Congress bearing on that precise point. Finally it is unique in the treatment accorded this Petitioner by the Court of Appeals, which retried his case in the absence of any jury.

For these reasons, this case should be reviewed by this Court.

Respectfully submitted,

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February 3, 1979

APPENDIX

APPENDIX A

CRIMINAL DOCKET - U.S. District Court

Felony District 650
 Office 3 6-13-77

U.S. v. TUCKER, LANDRUM
 2005 North Lake Shore Drive
 Chapel Hill, N.C. 27514

Docket No. 30245

Def. 1

6-13-77 Indictment filed.

6-13-77 Misc. Complaint dated 5-26-77 & filed 6-1-77
 included w/file.

6-13-77 Following documents received from Middle
 Dist. N.C. 6-10-77: Cy Criminal Docket
 Sheet; Initial Crim. Proceedings before U.S.
 Magistrate; Waiver of Removal Hearing dtd
 6-6-77; Order Specifying Methods & Condi-
 tions of Release—Personal Recognizance—Or-
 dered to appear, U.S. District Court, Nash-
 ville, Tenn. 6-15-77—Release ordered 6-6-77.
 Warrant executed by USM 6-6-77 at Greens-
 boro, N.C.

6-15-77 Clerk's Resume of Court Proceedings filed.
 Deft. arraigned, PNG Trial set for 7-8-77
 9:00 a.m., allowed 7 days to file pretrial
 motions. Bond remain same.

6/22/77 FILED: Motion to Quash by Atty Binkly C/S
6/22/77 FILED: Motion for Discovery C/S

6/23/77 ENTERED: Deft's Motion for Discovery marked GRANTED CY USA, USM, USP, Deft & Atty Binkley

6/23/77 ENTERED: Deft's Motion to Quash marked "The Gov't will respond w/in 10 days" CY USA, USM, USP, Deft & Atty Binkley

6-28-77 Filed: Govt. Traverse to deft. motion to quash. C/S.

7-1-77 Memorandum of Law filed by AUSA Brown. C/S

7-1-77 Order entered. Ordered that hearing on deft's Motion to Quash will be held Tues. 7-5-77, 1:00 P.m. Cy to USA, USM, USP, Deft. & Atty Binkley

7/5/77 FILED: Clerk's Resume of Court Proceedings on 7/5/77 Motion to Quash Indictment Denied

7/6/77 ENTERED: ORDERED Motion to Quash DENIED CY USA, USM, USP, Deft & Atty Binkley 7/7/77

7/9/77 FILED: Clerk's Resume of Court Proc. on 7/8/77: Jury Impaneled- Respited to 7/9/77 - Jury found Guilty Sent set for 8/12/77 Bond Remain Same

7/9/77 FILED: Verdict Form- Guilty

7/8/77 FILED: Special Charge by Atty Binkley marked Refused by Judge Morton

7/15/77 FILED: Motion for New Trial by Atty Binkley C/S

7/15/77 FILED: Motion for Judgement of Acquittal by Atty Binkley C/S

7/15/77 ENTERED: Motion for Judgment Acquittal marked DENIED CY USA, USM, USP, Deft & Atty Binkley

7/15/77 ENTERED: Motion for New Trial marked DENIED CY USA, USM, USP, Deft & Atty Binkley

8-1-77 Notice of Appearance filed by W. Ovid Collins, Jr., Bernhard G. Bechhoefer, Joseph H. Sharlitt as successor counsel to deft. Tucker. C/S (Counsel intends to file by 8-10-77 Motion seeking Reconsideration of Courts order 7-15

8-1-77 Affidavit of Joseph H. Sharlitt filed.

8-2-77 Motion to withdraw as counsel of record for deft. filed by Joe P. Binkley. C/S

8/2/77 FILED: Clerk's Resume of Court Proceedings on 8/2/77: Attys Sharlitt, Bechhoefer and Collins retained Sentencing reset to 8/19/77

8/3/77 ENTERED: Motion by Atty Binkley to withdraw as counsel marked GRANTED by Judge Morton CY USA, USM, USP, Deft, Attys Collins, Sharlitt, Bechhoefer and Binkley 8/4/77

8/15/77 FILED: Waiver of Appearance (made at hrg by Atty Sharlitt) on 8/2/77 and for postponement of sent. from 8/12/77 to 8/19/77 made by Deft

8-16-77 Filed: OCR Transcript of Proceedings of July 5, 1977 & July 8, 1977, one vol., 201 pages.

8-19-77 Filed: Waiver of all objections to the postponement of sentencing from Augst 18, 1977 to 9-23-77. Waiver includes *inter alia*, and further waives any claims under local Rule 7 (Sentencing, page 20) of the Speedy Trial Act of 1974 for the MD TN. CY: USA, USM, USP, Deft., Attys: Collins, Sharlitt, Bechhoefer.

ENTERED: Order approving waiver of the above mentioned postponement of sentencing until 9-23-77 by Judge Morton. CY: USA, USM, USP, Deft., Attorneys Collins Sharlitt and Bechhoefer. 8-19-77

8/23/77 FILED: Ltr to Judge Morton from Deft's mother dtd 8/15/77

9/16/77 FILED: Motion for Reconsideration of Denial of Motion for Judgment of Acquittal w/ Memo in Support by Attys for Deft C/S

9/19/77 FILED: Government's Response to Deft's Motion for Reconsideration of Denial of Motion for Judgment of Acquittal w/ Memo in Support BY AUSA Windsor C/S

9-23-77 ENTERED: J&C, PNG, Verdict of guilty as charged in the 1 ct. indictment. Imp. of sent. suspended and deft placed on probation for a period of 2 years. Special condition of probation that deft. is to give 8 hours free professional service a week to a community health center under direction of the probation office. CY: USA, USM, USP (3), DEFT. ATTYS. Ovid Collins, Jr., Sharlitt, Bechhoefer. 9-26-77

9-30-77 Filed: Motion For Stay Pending Appeal. C/S (Behalf deft.)

9-30-77 Entered: Order: Motion for stay pending Appeal is Granted. Cy USA, USM, USP, Deft., Atty. Collins, Bechhoefer, & Sharlitt.

9-30-77 Notice of Appeal filed. Cy: USA, USM, USP, AUSTIN MALLEY w/cy Criminal Appeals Form (Malley only) 10-3-77

10-3-77 Statement of Docket Entries, Criminal Appeals Form mailed to 6th CCA w/attested copy of Notice of Appeal.

10-4-77 Filed: Letter dated Oct. 3, 1977 to Clerk from Ovid Collins.

10-4-77 Filed: Letter read into record by Mr. Sharlitt on Sept. 23, 1977. Same filed this date. Letter to Mr. Sharlitt from Thomas E. Curtis, M.D. Professor and Chairman.

10-31-77 Filed. OCR transcript of proceedings of 8-19-77. 1 vol, p. 1-18. (Original & Clerk's cy)

11-7-77 Entered: Ordered that time for filing and docketing the record on appeal to be extended to and including November 21, 1977. CY: USA, USM, USP, Deft. Attys Collins, Sharlitt and Bechhoefer. Att cy to 6th CCA (Mailed 11-8-77)

11-18-77 Filed: Clerk's Copy of OCR T/S of Proceedings of July 5 and 8, 1977 1 fol. 201 pages

11-18-77 Filed: Original Copy of OCR T/S of Proceedings of August 2, & Sept. 23, 1977. 1 Vol. 35 pages

11-18-77 Record on Appeal mailed to CCA. Cy Index of Record and Docket Sheet USA, Deft & atty. attys of record.

11-28-77 Filed: OCR recording of proceedings dated 6-15-77 of arraignment.

12-20-77 Filed: Court Reporters Certificate of Correction of Transcript

12-20-77 Entered: Order Correcting The Transcript. Change words "isn't material to "is material". The Clerk shall, forward a copy to Clerk for the U.S. Court of Appeals for inclusion as a supplement to the record.

12-20-77 Supplemental Record on appeal mailed to CCA. Cy to USA, Attys of record and Deft. att cy docket entries.

[Filed Jun 13 1977]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
Nashville Division

No. 77-30245-NA-CR

18 U.S.C. §1621

UNITED STATES OF AMERICA

v.

LANDRUM TUCKER

INDICTMENT

The Grand Jury charges:

1. On or about the 25th day of May, 1977, in the Middle District of Tennessee, LANDRUM TUCKER, while under oath as a witness in a case then before the United States District Court for said district entitled, *United States of America v. David Wayne Burks*, Criminal Case No. 75-246-NA-CR, did willfully and knowingly and contrary to said oath, state material matter which he did not believe to be true, that is to say:

2. At the time and place aforesaid, the Court was engaged in the hearing of the aforementioned case wherein David Wayne Burks, the defendant therein, was, through counsel, presenting evidence for the Court's consideration on the question of establishing conditions of release from custody pending appeal for David Wayne Burks.

3. It was a matter material to said hearing to determine the basis for conclusions reached by LANDRUM TUCKER, a psychiatrist, and to which LANDRUM TUCKER

testified during the hearing on his direct examination by the attorney of David Wayne Burks, and which conclusions were offered to the Court in support of the proposition that David Wayne Burks should be released from custody and allowed to go to the state of Massachusetts.

4. At the time and place aforesaid, LANDRUM TUCKER, while under oath and testifying from the witness stand, did state that he had learned facts upon which he based his conclusions and certain of the portions of his testimony there from letters written to him from prison by David Wayne Burks.

5. At the time and place aforesaid, LANDRUM TUCKER, while under oath, did knowingly declare before said Court with respect to the aforesaid material matter, as follows:

(Answers by Landrum S. Tucker under oath)

Q. How did you learn of the female therapist?

A. Mr. Burks told me about her in the interview.

Q. Is he the only one that ever told you about the female therapist?

A. No. I think Mr. Durham mentioned her. I think Mr. Burks told me first when he had written me a letter about asking me to see him.

Q. Do you know anything of his friendship with the female therapist?

A. Only the relationship and what he told me about it within the prison. I think he worked with her but I forgot now what capacity his job was.

Q. Did he tell you only this morning what his job was or was it another time?

A. It think he told me this morning. I don't recall it in the letter. He may have.

THE COURT: When was this letter written? It is one letter or several letters from him?

THE WITNESS: This particular letter was written I guess in about March or April of this year.

Q. Did you ever seek to contact the female therapist?

A. No, I didn't.

Q. Did David ever tell you he had obtained from her a recommendation that he be let out on bond?

A. No, he didn't.

Q. Did he tell you that?

A. No.

MR. WINDSOR: No further questions.

MR. DURHAM: We will call Mr. Burks, V.E. Burks.

THE COURT: Let me ask this witness another question. As I understand it you hadn't seen the defendant until today form the time of the trial in this court, is that right?

THE WITNESS: That is true.

THE COURT: Now, you had been getting mail from him from time to time?

THE WITNESS: That's right.

THE COURT: How many letters had you gotten from him?

THE WITNESS: Let's see. I have gotten three or four letters from Mr. Burks. One he wrote me about he was trying to get disability from the military because of the fact I had said in the trial I felt some of his problems stemmed from his experiences there. He wanted to know if I would repeat that to the military.

I said I would get a copy of that statement. There were a couple of letters about that.

THE COURT: Did you do that?

THE WITNESS: Yes, I did.

THE COURT: Okay. Go ahead.

THE WITNESS: A couple of letters were about being at Butner, asking me for the possibility that I could see him there and treat him. Those are the communications.

THE COURT: Now since he has been at Butner which you say is only thirty miles from where you are, you haven't seen him. How many letters have you had from him since he was in that area?

THE WITNESS: Two or three.

THE COURT: Two or three since then and —

THE WITNESS: Maybe I think there was two from Terre Haute and about two from when he was at Butner.

THE COURT: What have the letters been about that he sent to you since he got down to Butner?

THE WITNESS: There was another letter asking me to send another statement about my statement about his experience in the military and a letter about asking me for treatment there.

THE COURT: Well, then you responses then—correct me if I am in error—have been limited to furnishing statements to him that you previously made for such use as he may desire and refusal to do anything about treating him at Butner, is the right?

THE WITNESS: That's right.

THE COURT: You haven't counseled him in anyway by mail or given him any psychiatric advice or anything of that sort?

THE WITNESS: No.

THE COURT: All right.

BY MR. WINDSOR, CONTINUED:

Q. Have you ever treated him?

A. No.

Q. Did you bring his letters with you to court here today?

A. No.

Q. Did you bring your responses to his letters here to court today?

A. No.

Q. Where are they?

A. They are in a briefcase.

Q. Where is the briefcase?

A. It's, uh, in my office.

Q. Where, what city?

A. North Carolina, Chapel Hill.

Q. Did you bring any file with you today concerning David Burks?

A. No.

Q. Did you bring any papers concerning David Burks?

A. Uh, yes, there are a few papers.

Q. May we see them, please.

A. I would have to go get them.

Q. Why are the letters in you briefcase in North Carolina?

THE WITNESS: Uhm, Your Honor, I would like to take that back. I do have the letters with me.

Q. Where are they?

THE COURT: Get them then. Let's not fool around. You didn't mean it when you said they were in North Carolina?

THE WITNESS: No, I didn't.

THE COURT: You knew they weren't in North Carolina?

THE WITNESS: That's right.

THE COURT: We will take a recess.

(Whereupon, the hearing recessed.)

6. The aforesaid testimony of Landrum Tucker, as he then and there well knew and believed, was not true in that the letters were not in his briefcase in his office in Chapel Hill, North Carolina, when he testified that they were, and in that the letters and briefcase were outside

the courthouse in Nashville, Tennessee, in the automobile of the attorney who was representing David Wayne Burks and who had called LANDRUM TUCKER to the witness stand.

In violation of Title 18, United States Code, Section 1621.

A TRUE BILL

Foreman

Acting United States Attorney

 75-246-NA-CR

BURKS, DAVID WAYNE

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

CAUSE

28 U.S.C. Sec. 1331(a) and Sec. 2255—Petition to Quash Parole Violator Warrant and Motion for Bond. Claim that parole violator warrant was unlawfully issued because petitioner was never lawfully paroled.

ATTORNEYS

Bart Durham
 1104 Parkway Towers
 Nashville, Tennessee 37219

Petitioner

Charles H. Anderson
 United States Attorney

Defendant

PROCEEDINGS

6-9-77 Filed: Motion for Leave to Proceed in Forma Pauperis. Copy to USM for service

6-9-77 Filed: Affidavit in Support of Motion for leave in forma pauperis. Copy to USM for service
 Entered: Order Granting Forma Pauperis. *Case Notice No. 1* copy to USM for service

6-9-77 Filed: Petition to Quash Parole Violator Warrant and Motion For Bond. Copy to USM for service
 Told Lucy Hood at USM office to serve immediately and personally carried a copy of all above documents to USA office and told the receptionist to give to Rick Windsor immediately.

6-13-77 Filed: Affidavit in Support of Request to Proceed in Forma Pauperis.

6-14-77 Filed: Interim Response to Defts Petition to Quash behalf deft. C/S

6-15-77 Filed: Supplement to motion for bond, affidavit, with exhibits 1, 2, & 3 attached. C/S

6-24-77 M/R: Motion, Order, Habeas Corpus, Affidavit served on Charles H. Anderson, U.S. Attorney, on 6/10/77.

8-31-77 Filed: Cy Ltr to Petitioner Burks from AUSA Windsor dtd 8/30/77 w/att. cy Ltr to USA from Burks

8-31-77 Filed: Motion to Prohibit Transfer of Prisoner by Atty Durham on behalf Petitioner. C/S
(See Criminal Docket Sheet for Entries)

12-2-77 Filed: Order of the 6th CCA. It is ordered that the respondents file an answer with the 6CCA within 20 days from the entry of this Order (entered 11/30/77), Rule 21(c), Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT
 MIDDLE DISTRICT OF TENNESSEE
 Nashville Division

No. 77-3222-NA-CU

[Filed: June 10, 1977]
 Frank E. Williams
 Deputy Clerk

DAVID WAYNE BURKS,
 Petitioner
 v.

UNITED STATES OF AMERICA,
 Respondent

**PETITION TO QUASH PAROLE VIOLATOR
 WARRANT AND MOTION FOR BOND**

The petitioner, David Wayne Burks, would respectfully show unto the Court:

1. This is an action brought to quash a parole violator warrant issued May 24, 1977 which attempts to revoke the parole granted him July 18, 1974 from a conviction for armed bank robbery in the United States District Court for the Southern District of Ohio.

2. This Court has jurisdiction pursuant to 28 U.S.C. Section 1131(a) (Federal Question), Section 2255 (Federal Habeas Corpus), and the plenary powers of a United States Court to issue the writ of habeas corpus whenever any petitioner shall be unlawfully restrained within its jurisdiction. Petitioner is being unlawfully

restrained in violation of Due Process, federal law, and his rights under the Fifth Amendment to the United States Constitution. Section 2255 forms have not been used because the forms are inappropriate to an action brought in a foreign district attacking the validity of a parole violator warrant.

3. He was convicted for armed bank robbery in this Court in 1976, and his conviction was reversed and remanded by the United States Court of Appeals for the Sixth Circuit. A petition for certiorari is presently pending before the United States Supreme Court.

4. A hearing was held May 25, 1977 on his application for bond from his most recent conviction. He was informed for the first time in open court that a parole violator warrant had been issued the previous day based on an assertion that he had possessed a gun on a certain unspecified date. He has never seen or been served with a copy of the warrant and, thus, is unable to attach a copy to this petition.

5. The previous sentence in the Southern District of Ohio was vacated and remanded by the Sixth Circuit in May, 1974. *Burks v. United States*, 496 F.2d 24 (6th Circ). The petitioner was never resentenced after the decision of the Sixth Circuit. He was allegedly given parole July 18, 1974, but this was without authority under law. Because the Sixth Circuit had vacated the sentence, there was no sentence from which he could be paroled.

6. Petitioner is aware that he must exhaust his administrative remedies where the Parole Commission chooses to revoke parole. 18 U.S.C. Section 4213 et seq. (1976); 28 C.F.R. Section 2.44, Section 2.52.

In the event this Honorable Court holds that the petitioner was legally admitted to parole, and, thus, the Parole Commission did have jurisdiction to issue a parole violator warrant, petitioner has requested a local revocation hearing as provided by 18 U.S.C. Section 4214(a) (1)(A) and 28 C.F.R. Section 2.49.

7. The petitioner would respectfully show unto the Court that this Honorable Court has the discretion to admit a detainee under a parole violator warrant to bond pending a hearing in either the District Court or before the designee of the Parole Commission. He would show that no new hearing is necessary for bond adjudication as all the information concerning him was presented before this same Honorable Court in *United States v. Burks*, No. 75-246-NA-CR, on May 25, 1977.

WHEREFORE, petitioner PRAYS that the parole violator warrant be quashed because the Parole Commission had no jurisdiction over petitioner to issue such a warrant and that a bond be set for him pending a hearing before this Court or before the designee of the Parole Commission. He further PRAYS for general relief.

Respectfully submitted,

/s/ BART DURHAM
Attorney for Petitioner
1104 Parkway Towers
Nashville, Tennessee 37219

[3] TRANSCRIPT OF PROCEEDINGS
Wednesday, May 25, 1977

THE COURT: Call the next case.

THE CLERK: 75-246, Nashville Criminal, United States of America vs. David Wayne Burks.

THE COURT: Now, in this case I was advised within the last thirty minutes by the Marshal's office that they had been directed that if the defendant is released today under this proceeding to pick him up on a parole violators warrant.

Are you aware of that, Mr. Durham?

MR. DURHAM: No, sir, but I would like to address myself to it.

THE COURT: Don't talk to me about it. I don't have anything to do with it. You don't know anything about it?

MR. DURHAM: I don't know about the thirty minutes but I know about the—I would like to make an argument why that is illegal, why the warrant ought to be quashed. I think this Court has jurisdiction.

I can simply state that it is on a case reversed and remanded and any parole without the conviction that is reversed and remanded and the mandate has come down from Cincinnati, Judge Weinman, and it has never been ruled on—[4] You can't be paroled from a non-sentence.

THE COURT: I don't have any of that before me.

MR. DURHAM: Yes, sir.

THE COURT: That is not part of the record in this case.

MR. DURHAM: I suppose I should file a motion to quash and we would have a hearing on it.

THE COURT: Well, maybe you should and maybe something should be done in the district where the case

is pending, if any. I don't think I have anything to do with it.

Do you know anything about it?

MR. WINDSOR: No, sir, I don't know anything about it. I do recognize Judge Weinman as being the sentencing judge in the case.

MR. DURHAM: I would advise that the warrant also states the conviction of bank robbery and kidnapping in this Court, the original charge. The conviction has been reversed. I think the proper procedure—

THE COURT: What is that?

MR. DURHAM: This present instant case—

THE COURT: Did you say bank robbery and kidnapping charges had been reversed?

MR. DURHAM: The bank robbing has.

THE COURT: The other one hasn't been tried, has it?

[5] MR. DURHAM: Right.

THE COURT: All right.

MR. WINDSOR: I do know the parole violators warrant was modified yesterday afternoon.

THE COURT: That is what I was informed just thirty minutes before I came in. That is why I raised the question.

MR. DURHAM: I don't know anything about it.

THE COURT: The fact this case was reversed has nothing to do with it. He wasn't charged with possession of a gun and my understanding is that the parole violators warrant is based on an allegation that he possessed a gun on a certain date and as far as I know it may well be true that he did possess a gun on that date.

MR. DURHAM: In other words, it is not based on what you are saying—not based on a judicial conviction?

THE COURT: Possession of a gun. That is what it says. That is all I know. I haven't seen the warrant. All I saw is the teletype the Marshals got and they showed it

to me within the last half hour. That is the first I heard about it.

MR. DURHAM: That may make this hearing moot then. I think we should go ahead with Dr. Tucker.

THE COURT: I am perfectly willing for any record to be made that you desire but I also wonder what the [6] point of it is with that statement of events before me. I am perfectly willing for both sides to put the evidence on and we will hold it in abeyance to see if there is something else in this other matter.

MR. DURHAM: I would like to do that.

THE COURT: What is your contention, Mr. Durham, the Court should do so I will know in advance?

MR. DURHAM: I would like to see a \$25,000 bond, ten percent deposit raised with the Court and proof will be the deposition of Dr. Farrer filed yesterday. I don't know if Your Honor had an opportunity to read it or not. I took Dr. Farrer's statement yesterday and it is filed. Briefly it says that—

THE COURT: Wait just a minute.

THE CLERK: It hasn't been furnished to me, Your Honor.

MR. DURHAM: The Court Reporter certified the original was filed with the Clerk. I have a copy.

THE COURT: I am not going to read that at this time but I will take it.

What did you say about \$25,000 bond?

MR. DURHAM: Your Honor asked me what I wanted the Court to do. I suggested \$25,000 bond and ten percent deposited in the Register of the Clerk.

THE COURT: Any other restrictions whatsoever?

[7] MR. DURHAM: No, sir. Well, that he live with his father in Massachusetts and be under the control and custody of his father in Massachusetts.

Dr. Farrer does not suggest that he be required to get medical help up there. He states that he feels it is not too good when it is court imposed but it would be helpful if David voluntarily wanted that. Dr. Farrer does suggest employment—I suppose that would be a reasonable restriction—to live with his father and employment and twenty-five thousand dollars with ten percent down.

THE COURT: And what is the government's position?

MR. WINDSOR: The government position, Your Honor, is that the defendant should not be released particularly under the provisions of Title 18, United States Code Section 3148 in the provisions that if it appears that a risk of danger is believed to exist. I submit that in this case. The Court has full awareness of the record, both in this trial and the trial before for the bank robbery in Ohio. Both were committed with dangerous weapons and both committed under circumstances that placed the lives of bank employees and other people in danger and that a risk of danger does exist and that the defendant should not be released for that reason.

THE COURT: All right. I will hear such evidence as you all desire to offer.

MR. DURHAM: All right. We call Dr. Tucker.

DR. LANDRUM S. TUCKER, JR.,
a witness called on behalf of the defendant, having been first duly sworn was examined and testified as follows:

* * *

[25] BY MR. WINDSOR, CONTINUED:

Q. Have you ever treated him?

A. No.

Q. Did you bring his letters with you to court here today?

A. No.

Q. Did you bring your responses to his letters here to court today?

A. No.

Q. Where are they?

A. They are in a briefcase.

Q. Where is the briefcase?

A. It's, uh, in my office.

[26] Q. Where, what city?

A. North Carolina, Chapel Hill.

Q. Did you bring any file with you today concerning David Burks?

A. No.

Q. Did you bring any papers concerning David Burks?

A. Uh, yes, there are a few papers.

Q. May we see them, please.

A. Uh, yes, there are a few papers.

Q. May we see them, please.

A. I would have to go get them.

Q. Why are the letters in your briefcase in North Carolina?

A. THE WITNESS: Uhm, Your Honor, I would like to take that back. I do have the letters with me.

Q. Where are they?

THE COURT: Get them then. Let's not fool around. You didn't mean it when you said they were in North Carolina?

THE WITNESS: No, I didn't.

THE COURT: You knew they weren't in North Carolina?

THE WITNESS: That's right.

THE COURT: We will take a recess.

(Whereupon, the hearing recessed.)

(Whereupon, the hearing continued pursuant to recess.)

[27] THE COURT: Do you care to make any statement, sir?

THE WITNESS: Yes, sir. I wanted to apologize for saying the briefcase was in North Carolina.

THE COURT: Would you mind stating for the record why you lied about it, sir.

MR. DURHAM: If Your Honor please, there is no indication—

THE COURT: Mr. Durham, you have a seat. He told us that he knew he had told a story when he said it was in North Carolina.

You did know it wasn't in North Carolina when you said it, didn't you?

THE WITNESS: That's right.

THE COURT: You knew it was here?

THE WITNESS: That's right.

THE COURT: You stated it. I am asking you why you told us a lie?

THE WITNESS: Two things, Your Honor. One was that I—there are some letters I think some of my replies are in North Carolina, and back in the initial trial Mr. Windsor brought up a letter that I had written, a journal that sort of startled me at the time. I think momentarily the idea of letters hit me wrong and I just lost my judgment there and had to sort of recoup myself and realize it was a mistake.

[28] THE COURT: To tell us something that wasn't true?

THE WITNESS: That's exactly right.

THE COURT: All right. Now, don't tell me, Mr. Durham, he hadn't lied because he had, Now, go ahead.

MR. DURHAM: May I say one thing, Your Honor?

THE COURT: Yes, you can keep on talking all you want to. We will listen and get it on the record.

MR. DURHAM: If Your Honor please, the word lie means an intentional—

THE COURT: A lie means an intentional misstatement of fact. He just stated he did make an intentional misstatement of fact. He knew he had them here. He knew they were not in North Carolina, and he said it because he didn't want to bring up other matters.

Isn't that exactly what you said?

THE WITNESS: Pretty close to it, Your Honor.

THE COURT: All right. Go ahead. Does anybody have any further questions of this witness?

MR. WINDSOR: No questions.

THE COURT: About the letters or anything else?

MR. WINDSOR: Yes, sir, I want to see the letters if it please the Court.

[29] BY MR. WINDSOR, CONTINUED:

Q. Dr. Tucker, the Marshal is handing me a Manila folder you handed him from your briefcase. Do you have anything else in your briefcase pertaining to this matter that you brought with you today?

A. No, I don't.

MR. WINDSOR: May I have a moment to examine these, Your Honor?

THE COURT: All right.

MR. WINDSOR: Your Honor, I would ask that this file be received by the Clerk as part of the record in this proceeding.

THE COURT: Any objection?

MR. DURHAM: Yes, sir. This is Dr. Tucker's files. If he wants to make copies I suppose—

THE COURT: Any objection to Xerox copies being made part of the record, either that or—

MR. WINDSOR: Yes, Your Honor, and I would ask the Court to issue a subpoena to have the Grand Jury get this file, if that will be necessary.

THE COURT: I don't believe I understand that.

MR. WINDSOR: Well, I would ask Your Honor to allow me sufficient time to arrange for the issuance of a subpoena on behalf of the Grant Jury.

THE COURT: No. We are going to make this file a part of the record in this case and Xerox copies of it, give Xerox copies to Dr. Tucker and return the others—

MR. WINDSOR: Excuse me. I had the order reversed.

MR. DURHAM: That is satisfactory.

MR. WINDSOR: That is satisfactory with me.

* * *

THE COURT: The original will be kept in the Clerk's file and Xerox copies will be furnished to the doctor.

MR. WINDSOR: I have no objection to that.

Q. Dr. Tucker, where were these letters and your briefcase before you left the witness stand a moment ago?

A. They were outside in Mr. Durham's car.

Q. Did you go there and get them? Did anybody go with you?

A. Mr. Durham.

Q. Was the briefcase opened between the car and courtroom on your way back?

A. Yes.

Q. Who opened it?

A. I did.

Q. What did you do when you opened it?

A. I looked inside.

Q. Did you take anything out of it?

A. No.

* * *

[47] MR. WINDSOR: No further questions.

MR. DURHAM: Nothing further.

THE COURT: Anything further?

Call your next witness.

MR. WINDSOR: No witnesses, Your Honor.

THE COURT: All right. I think what we will do is what I think we agreed. I want to be sure everybody hears me.

Did we agree in the beginning that we would make no decision today pending a determination of what the facts are with reference to this other warrant?

MR. DURHAM: If we did, I want to urge Your Honor not to do that and go ahead and decide this case today [48] and let us worry about that other one either in this district or the Southern District of Ohio, whichever is appropriate.

I will file a motion to quash that other one. I don't see any reason to defer ruling on this.

THE COURT: I don't think I understood you. Did you say you agreed to it but now you don't? Is that what you are saying, Mr. Durham?

MR. DURHAM: I said if I agreed, I am not certain I did.

THE COURT: I will take a recess and find out whether you did. We have a record here of everything that occurred. I will find out if you agreed. Whether you agreed or not, I am not going to decide it this afternoon. I think at least we can wait until tomorrow or the next day so we can get other information with relation to this other matter.

You stated it might well be moot if the other warrant is to be served. So I will not make a decision on it today.

* * *

BEFORE HON. L. CLURE MORTON
July 5, 1977

[20] Gentlemen, I think it's clear that the Congress intended for both of them to stay. They made it as clear as they could, and they give the U.S. Attorney the option to either try—to either indict under the easier rule of statute with the recantation clause or to indict under the old statute which, in effect, invokes the two-witness rule.

Therefore, the motion is denied, and, Mr. Brown, you will prepare an order providing the motion filed by the defendant—Motion to Quash filed by the defendant on June the 22nd, 1977, is denied.

* * *

18 § 1621
CRIMES AND CRIMINAL PROCEDURE
CHAPTER 79.—PERJURY

§ 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

As amended Oct. 18, 1976, Pub. L. 94-550, § 2, 90 Stat. 2534.

* * *

§ 1623. False declarations before grand jury or court.

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any

false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

- (1) each declaration was material to the point in question, and
- (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declara-

tion has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub. L. 91-452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932, and amended Pub. L. 94-550, § 6, Oct. 18, 1976, 90 Stat. 2535.

APPENDIX B

[Filed Oct 16 1978]

No. 77-5356

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LANDRUM TUCKER,

Defendant-Appellant.

ORDER

Before: EDWARDS and LIVELY, Circuit Judges, and
JOHNSTONE,* District Judge.

On receipt and consideration of an appeal in the above-styled case; and

Noting ample evidence to support the jury's conclusion that defendant had knowingly given a false statement under oath, with the intention to deceive as charged in the indictment under 18 U.S.C. §1621 (1976); and

Finding that the proceeding involved was not moot and that the District Court plainly had proper jurisdiction in the premises; and

Further noting that appellant's primary appellate argument is that the defense of recantation was appropriate to a perjury charge under §1621, just as it would have been if the indictment had been laid under §1623; and

*Honorable Edward H. Johnstone, United States District Judge for the Western District of Kentucky, sitting by designation.

Assuming, without deciding, that such a defense may be appropriate under §1621, we nonetheless find on this record that the defense of recantation is rebutted by the fact that while recantation occurred quickly, it also occurred under a threat that made it manifest that the falsity would be exposed,

No, therefore, the judgment of conviction is affirmed.

Entered by order of the Court

/s/ John P. Hehman

Clerk

APPENDIX C

[181] Three essential elements are required to be proved in order to establish the offense charged in the indictment:

"(1) That the testimony was given under oath, taken by the defendant before the United States District Court as to some material matter in said trial as charged;

"(2) That the testimony so given was false in one or more of the aspects charged; and

"(3) That the false testimony was willfully given as charged."

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged.

The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The materiality of the matter involved in the alleged false testimony is not a matter with which you are concerned but rather is a question for the Court to decide.

You are instructed that the questions asked the defendant at the trial in the Federal District Court in Nashville, as charged in the indictment, as to the knowledge of the—as to the knowledge of the defendant or the whereabouts of certain letters and briefcase on May 25th, 1977,

[183] Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the government must prove that the defendant knowingly did an act which the law forbids or knowingly failed to do an act which the law re-

quires, purposely intending to violate the law. Such intent may be determined from all of the facts and circumstances surrounding the case.

An act or failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operation of the human mind. But you may infer the defendant's intent from the surrounding circumstances.

You may consider any statement made and done or omitted by the defendant and all other facts and circumstances in evidence which indicate a state of mind.

It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled

[189] good law, but I will make a little different stab at it.

BY MR. WINDSOR: Your Honor, I didn't see it.

BY THE COURT: That's all right, you don't need to see it.

(THEREUPON THE JURY WAS ASKED TO TAKE THEIR RESPECTIVE SEATS IN THE JURY BOX AND THE PROCEEDINGS CONTINUED)

BY THE COURT: You can all stand right there in a group when you all get in here. I just wanted to add one sentence to one of my jury charges.

All I want to say was, and I think I probably covered it in the charge, but if I didn't I want to tell you in deter-

mining the intent that is involved in this matter, you take into consideration all of the facts and circumstances from beginning to the end, everything you have heard, and you give each fact and circumstance that weight that you think it's entitled to receive.

You can step back out now.

(THEREUPON THE JURY WAS EXCUSED FROM THE COURTRoom)

BY THE COURT: I will write refused on this. Anything further?

BY MR. BINKLEY: No, sir.

BY THE COURT: Then in that case here is the verdict form. Give the Marshal a copy of the indictment and all exhibits—not the exhibits for identification, leave those back.

[190] If you gentlemen will check the exhibits so we will be sure, but I think we only have one for identification, do we not?

BY MR. WINDSOR: I think we have five of them.

BY THE COURT: Where is the file? Go ahead and take this back now.

Mr. Windsor, the charge that he requested which I didn't give was "willingness to correct a misstatement, though nor ordinarily a defense to a perjury prosecution is potent to negative willful intent to swear falsely."

It may be potent, but that is a matter of fact for the jury to determine whether or not it's potent or not; that is the reason I didn't give it, but I have marked it here and it will be filed.

Mrs. Meritt, if you will mark this as filed and we will be in recess pending the return of the jury.

It's now a quarter past five and we will stay awhile.

BY THE CLERK: Everyone rise, please, We will be in recess until the return of the jury.

(THEREUPON COURT RECESSED AND RECONVENED IN THE PRESENCE OF THE JURY)

BY THE COURT: Ladies and gentlemen of the jury, it's now 6:20 and it's getting late in the day, and I assume you have not reached a verdict as yet, because the Marshal has

APPENDIX D

[FILED JAN 5, 1979]

No. 77-5356

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LANDRUM TUCKER,
Defendant-Appellant
ORDER

Before: EDWARDS and LIVELY, Circuit Judges, and
JOHNSTONE,* District Judge.

On receipt and consideration of a petition for rehearing; and

Noting therein no issue of substance presented which was not taken fully into account prior to issuance of the court's order,

Now, therefore, said petition is denied.

Entered by order of the Court

/s/ John P. Hehman
Clerk

*Honorable Edward H. Johnstone, United States District Judge for the Western District of Kentucky, sitting by designation.

APR 9 1979

MICHAEL RODAK, JR., CLERK

No. 78-1211

In the Supreme Court of the United States

OCTOBER TERM, 1978

LANDRUM TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

BARRY A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1211

LANDRUM TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 30a-31a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1978. A petition for rehearing was denied on January 5, 1979 (Pet. App. 36a). The petition for a writ of certiorari was filed on February 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's perjury could be prosecuted only under 18 U.S.C. 1623 and not under 18 U.S.C. 1621.
2. Whether the evidence was sufficient to sustain petitioner's conviction under 18 U.S.C. 1621.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner, a psychiatrist, was convicted of perjury, in violation of 18 U.S.C. 1621. The imposition of sentence was suspended and petitioner was placed on two years' probation, a special condition of which was that he provide eight hours per week of free professional services to a community mental health center. The court of appeals affirmed (Pet. App. 30a-31a).

The facts adduced at trial showed that petitioner had been introduced to David Wayne Burks, then charged with armed bank robbery, by Burks' lawyer, Bart Durham, who asked petitioner to evaluate Burks in connection with Burks' insanity defense (1 Tr. 49, 61-62, 99).¹ Petitioner conducted the evaluation and testified on Burks' behalf at Burks' trial. After Burks was convicted and sentenced to the Federal Penitentiary in Terre Haute, Indiana, he corresponded with petitioner during his incarceration, and petitioner sought Burks' transfer to the Federal Correctional Institution in Butner, North Carolina, where more extensive psychiatric help was available (1 Tr. 52, 71, 100).

On May 25, 1977, a hearing on Burks' application for bail pending appeal was held in the district court at which petitioner was the sole witness on Burks' behalf. On examination by Burks' counsel, petitioner testified that although he had testified against Burks' release on bond in a previous bond hearing, an interview with Burks that morning had persuaded him that Burks would no longer be a danger to himself or others if released on bond (2 Tr. 8-10). On cross-examination, petitioner testified that he

had reached his conclusion only after interviewing Burks that day and that the last time he had spoken to Burks had been a year earlier (2 Tr. 12, 17). When the prosecutor asked whether petitioner had attempted to follow up his earlier treatment of Burks, petitioner replied that Burks had written him "a letter" requesting further treatment but that petitioner was unable to provide it (2 Tr. 14, 22). The prosecutor concluded his examination, but the court pursued the matter of the correspondence between Burks and petitioner and elicited petitioner's response that he had received three or four letters from Burks since his last interview (2 Tr. 23-25).

The prosecutor then continued his cross-examination and asked about the location of those letters (2 Tr. 25-26):

- Q. Did you bring his letters with you to court here today?
- A. No.
- Q. Did you bring your responses to his letters here to court today?
- A. No.
- Q. Where are they?
- A. They are in a briefcase.
- Q. Where is the briefcase?
- A. Its, uh, in my office.
- Q. Where, what city?
- A. North Carolina, Chapel Hill.
- Q. Did you bring any file with you today concerning David Burks?
- A. No.
- Q. Did you bring any papers concerning David Burks?

¹As used here, "1 Tr." refers to the transcript of petitioner's trial held on July 5 and 8, 1977 and "2 Tr." refers to the transcript of David Wayne Burks' bail hearing held in the United States District Court for the Middle District of Tennessee on May 25, 1977.

A. Uh, yes, there are a few papers.

Q. May we see them, please.

A. I would have to go get them.

Q. Why are the letters in your briefcase in North Carolina?

THE WITNESS: Uhm, Your Honor, I would like to take that back. I do have the letters with me.

Q. Where are they?

THE COURT: Get them then. Let's not fool around. You didn't mean it when you said they were in North Carolina?

THE WITNESS: No, I didn't.

THE COURT: You knew they weren't in North Carolina?

THE WITNESS: That's right.

THE COURT: We will take a recess.

Thereafter, petitioner was indicted and convicted under 18 U.S.C. 1621 for testifying falsely that he had not brought Burks' letters with him to the bond hearing.

ARGUMENT

1. Petitioner's principal contention (Pet. 12-19) is that 18 U.S.C. 1623,² passed in 1970 as part of Title IV of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 932, completely supersedes the general

perjury statute, 18 U.S.C. 1621,³ with respect to perjury committed in "any proceeding before or ancillary to any court or grand jury of the United States" (Section 1623(a)), and that such perjury cannot be prosecuted under Section 1621. In petitioner's view, the choice of statutes is significant in this case because he claims that his recantation would have entitled him to a judgment of acquittal under Section 1623(d), whereas recantation does not bar prosecution under Section 1621, but is only relevant to the intent of the defendant to testify falsely. See *United States v. Norris*, 300 U.S. 564, 576 (1937); *United States v. Lococo*, 450 F. 2d 1196, 1198 n.2 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972).

Petitioner's claim—in essence that Section 1623 repealed Section 1621 with respect to certain types of perjury—is incorrect. As petitioner concedes (Pet. 14),

the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

* * * * *

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

³18 U.S.C. 1621 provides in pertinent part:

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true;

* * * * *

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. * * *

²18 U.S.C. 1623 provides in pertinent part:

(a) Whoever under oath * * * in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * knowing

nothing in the language or legislative history of Section 1623 indicates an intent to repeal Section 1621; indeed Congress reenacted both Sections 1621 and 1623 in 1976 (with an amendment adding certain false declarations to their coverage) without changing Section 1621's broad application to statements made under oath before any "competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered * * *." Pub. L. No. 94-550, 90 Stat. 2534.

In any event, repeal by implication is unwarranted unless there is a "clear repugnancy" (*Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 457 (1945)) between the earlier and later statutes that makes them "irreconcilable" (*Morton v. Mancari*, 417 U.S. 535, 550 (1974)). There is no such repugnancy between Sections 1621 and 1623 as applied to perjury committed in a federal court. As a general matter, the mere fact that two statutes overlap with respect to the conduct they punish—as many statutes do—does not demonstrate such repugnancy that only one may be held to apply to that conduct; rather selection among overlapping statutes rests in the prosecutor's discretion. See *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952); *United States v. Noveck*, 273 U.S. 202 (1927).⁴ Moreover, there are significant differences between Sections 1621 and 1623 that indicate Congress'

⁴*United States v. Batchelder*, cert. granted, No. 78-776, Jan. 8, 1979), also involves two statutes that overlap with respect to the conduct they prohibit (possession of firearms) but that provide different maximum penalties. We contend in that case that either of those statutes (and their respective penalty provisions) may be used for firearms prosecutions, and the same arguments made in that case would apply here. There is no need, however, to hold this petition pending decision in *Batchelder*, because there are additional differences between the statutes involved in this case that rebut petitioner's claim of implied repeal. Moreover, whether two statutory provisions are irreconcilable, or indicate Congress' intent to supersede the earlier provision, depends on the particular facts of each statutory scheme.

intent that each provision have separate and independent effect. While recantation may, on certain conditions, be a bar to prosecution under Section 1623, while it would only be relevant to criminal intent under Section 1621, Section 1621 also imposes significant burdens on the prosecution that Congress eliminated for cases brought under Section 1623. Thus, in a prosecution under Section 1621 the government must prove that the statement was false, and must do so with direct evidence supported by the testimony of at least two witnesses. Under Section 1623, however, it is sufficient if the government shows that the defendant has "made two or more declarations, which are inconsistent to the degree that one of them is necessarily false [and an indictment] need not specify which declaration is false * * *." 18 U.S.C. 1623(c). Further, Section 1623(e) provides that proof need not be made "by any particular number of witnesses or by documentary or other type of evidence."

The statutory scheme thus indicates that Section 1623 was designed as an alternative means of prosecuting certain kinds of perjury that would facilitate prosecution in significant respects but at the same time would provide defendants with a means of avoiding those particular kinds of prosecutions—i.e., by recanting before the proceeding is substantially affected or before the false statement has been or is about to be exposed.⁵ The statutory scheme, however, does not indicate that Section 1623 was intended to repeal or displace Section 1621 as another means of prosecuting perjury before a federal court or grand jury, and the few courts that have ruled on the matter have held that it does not have that effect.⁶ The

⁵Thus, Section 1623(d) expressly limits the recantation bar to prosecutions brought "under this section * * *."

⁶*United States v. Diggs*, 560 F. 2d 266, 269 n.3 (7th Cir.), cert. denied, 434 U.S. 925 (1977); *United States v. Ruggiero*, 472 F. 2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973). Other cases have

statements in the decisions relied on by petitioner are, as he acknowledges (Pet. 17-19), dicta, since the convictions in those cases were upheld.⁷ In sum, petitioner was properly prosecuted under Section 1621, and there is no conflict among the circuits or other reason for this Court to review what petitioner stresses (Pet. 20, 29) is a "unique" case.

2. Petitioner also claims that even if prosecution were proper under Section 1621, the defense of recantation established by decisions under that section "would properly constitute a complete defense" (Pet. 21). That claim is unfounded.

It is well established in cases applying Section 1621 and other general perjury statutes that recantation is not a complete defense or a bar to prosecution but is merely evidence that may demonstrate the defendant's lack of intent to make the false statement in the first place. *United States v. Norris, supra*; *United States v. Lococo, supra*; *United States v. Kahn*, 472 F. 2d 272, 284 (2d Cir.), cert. denied, 411 U.S. 982 (1973). That issue was properly presented to the jury. The principal argument of petitioner's counsel at trial was that petitioner's recantation demonstrated a lack of intent to deceive (1 Tr. 152-

assumed without discussion the propriety of using Section 1621 to prosecute perjury that could also be prosecuted under Section 1623. See *United States v. Howard*, 560 F. 2d 281 (7th Cir. 1977); *United States v. Masters*, 484 F. 2d 1251 (10th Cir. 1973); *United States v. Wesson*, 478 F. 2d 1180 (7th Cir. 1973); *United States v. Pollak*, 474 F. 2d 828 (2d Cir. 1973).

⁷See *United States v. Kahn*, 472 F. 2d 272, 283 (2d Cir.), cert. denied, 411 U.S. 982 (1973); *United States v. Lardieri*, 497 F. 2d 317, 320 n.6 (3d Cir. 1974). *United States v. Devitt*, 499 F. 2d 135, 139 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975), on which petitioner relies (Pet. 18-19), expressly rejected the claim that the government was restricted in its choice of sections, and its statement that the government "would be expected to proceed under § 1623" was not intended to suggest any such limitation, as the Seventh Circuit's later opinion in *United States v. Diggs, supra*, makes clear.

157), and the trial court properly instructed the jury that intent to testify falsely "may be determined from all of the facts and circumstances surrounding the case" and that the jury "may consider any statement made and done or omitted by the defendant and all other facts and circumstances in evidence which indicate a state of mind" (1 Tr. 183; see also 1 Tr. 189).⁸ The jury, however, rejected petitioner's factual contention, which is not surprising in view of the fact that petitioner at the bond hearing freely admitted that he had knowingly misstated the whereabouts of the letters from Burks because he did not want to disclose certain matters relating to the letters (2 Tr. 26-28).

3. Petitioner finally contends (Pet. 24-28) that the court of appeals affirmed his conviction on an erroneous theory. Whether that is so is a close question, but the fact that the court of appeals may have relied on the wrong reasons to reach the correct result is not a reason for overturning its judgment. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

In its judgment order, the court of appeals rejected petitioner's claim that he should have been entitled to the recantation defense provided by Section 1623(d), stating (Pet. App. 31a): "Assuming, without deciding, that such a defense may be appropriate under §1621, we nonetheless find on this record that the defense of recantation is rebutted by the fact that while recantation occurred quickly, it also occurred under a threat that made it manifest that the falsity would be exposed." Petitioner argues that the court's reasoning was wrong because the

⁸The district court properly rejected (1 Tr. 190) petitioner's requested instruction that "willingness to correct a misstatement though no[t] ordinarily a defense to a perjury prosecution is potent to negative willful intent to swear falsely," on the ground that the "potency" of such evidence is a matter for the jury. See also *United States v. Kahn, supra*, 472 F. 2d at 284. The court instead reiterated its instruction that the jury could determine intent on the basis of all the facts and circumstances of the case (1 Tr. 189).

record does not show that he recanted only after it was manifest that he had testified falsely; because that question was not presented to the jury in any event; and because the court ignored the alternative provision of Section 1623(d) arguably barring prosecution after a recantation if the false declaration "has not substantially affected the proceeding."

Petitioner's first two arguments assume that whether the falsity was manifest is a jury question. However, since Section 1623(d) provides that certain recantations "shall bar prosecution under this section," whether a recantation satisfies the statutory standards would seem to be a question of law for the court, not a question of fact for the jury, and at least one court has so held. *United States v. Kahn, supra*, 472 F. 2d at 283 n.9. Under that view, it was not error for the court of appeals to hold, as a matter of law, that the recantation occurred after it had become manifest that the falsity was about to be exposed, since the record supports the reasonableness of that conclusion.⁹

The court of appeals did not consider whether the false declaration had "substantially affected the proceeding" before it was recanted, and it is not clear whether Section 1623(d) intended the failure of a false statement substantially to affect a proceeding to constitute an alternative ground for barring prosecution under that section whenever there has been a recantation. The disjunctive "or" in the statute supports petitioner's

⁹The legislative history of Section 1623 does not indicate whether the recantation conditions of subsection (d) were intended to be questions for the court or jury. The fact that the question may require resolution of factual issues does not necessarily make it a jury question. For example, it has been consistently held that the question of the materiality of false statements is a question of law for the court, even though it may turn on the resolution of disputed factual issues. See, e.g., *United States v. Anfield*, 539 F. 2d 674 (9th Cir. 1976).

argument; but the structure and purpose of the recantation provision would bar prosecution only if the false declaration had not substantially affected the proceeding and if the falsity had not become manifest. Cf. *United States v. Kahn, supra*, 472 F. 2d at 283-284; *United States v. Del Toro*, 513 F. 2d 656, 665 (2d Cir.), cert. denied, 423 U.S. 826 (1975).¹⁰ It is not necessary to reach that question in this case, however, since petitioner was properly prosecuted under Section 1621, and recantation is not a bar to prosecution pursuant to that section under any circumstances.¹¹

¹⁰As the court stated in *United States v. Del Toro, supra*, 513 F. 2d at 665, the purpose of Section 1623(d) "was obviously to induce the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution for doing so." Under petitioner's construction, however, prosecution would be barred in cases where a witness blatantly lied to a court or grand jury with intent to deceive, was immediately confronted with evidence contrary to his statement, and for that reason alone admitted that he had lied. That construction would not serve the purpose of encouraging witnesses voluntarily to correct their false statements but would simply provide a windfall to witnesses whose perjury was quickly exposed.

¹¹There is no merit to petitioner's further contention (Pet. 22-23) that the hearing on Burks' bond application was moot and that petitioner could not be charged with perjury for testifying falsely in a moot proceeding. In fact the bond proceeding was not moot (see *Ginyard v. Clemmer*, 357 F. 2d 291, 292 (D.C. Cir. 1966), and in any event petitioner cites no authority for the proposition that the existence of some other warrant against a bail applicant deprives a court of jurisdiction over the application, or immunizes witnesses in hearings on such applications from the penalties of perjury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1979

Supreme Court, U.S.
FILED

APR 17 1979

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. **78-1211**

DR. LANDRUM TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY OF PETITIONER

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REPLY OF PETITIONER

I. INTRODUCTION

The Government has chosen to submit a brief on the merits of the legal issues raised by the Petitioner. In so doing in this certiorari proceeding the Government has presented a cut-down, capsule version of the arguments on the merits. And in so doing, the Government has left unanswered the pressing reasons, set forth in the Petition, why this Court should consider the merits of the issues in this case in their entirety, with full briefing and argument. Those unanswered reasons demonstrate the severe difficulties encountered in administration of the two federal perjury statutes now in effect, if the decision below is permitted to stand.

II.

(a) Petitioner has argued that the Omnibus Crime Act of 1970 put into law major modifications of the federal perjury statute: *First*, it eliminated the two-witness rule, and *Second*, it created a statutory defense for timely recantation. Such modification dealt solely with perjury before federal courts and grand juries.

Now the Government concedes that the decision below nullifies these Congressional policies. It concludes summarily that this nullification — by whim of any prosecutor — is what Congress intended. But in so doing, the Government provides the Court with the most cursory of glances at the statutory scheme and history of Title IV, of the Omnibus Act¹ which it sets forth in two short paragraphs. Then, following, this brief glimpse into the history of an enactment that grew out of an extensive study by a Presidential Crime Commission, and was passed after more than three years of careful gestation by scholars and legislators, the Government concludes:

"The statutory scheme thus indicates that Section 1623 was designed as an alternative means of prosecuting certain kinds of perjury." (Gov. Opp. p. 7)

Nowhere in the extensive legislative history of Title IV does that statement — or any statement remotely like it — appear. In sum, the history and statutory scheme of Title IV deserves more careful consideration than the Government has given it.

Properly, fully spread before this Court, the legislative history of Title IV will reflect a desire by Congress for a tough new perjury law with a wholly new recantation provision designed to induce voluntary abandonment of

the misstatement before justice was prejudiced. *That* Congressional policy has been totally unravelled by the decision below. In consequence this Court's review is essential because Congress never made explicit what is clearly implicit in the history of the provision: that the new section was intended to supplant the old perjury statute, (within the ambit of testimony in federal courts and Grand juries) in order to put into the law Congress' vigorous new anti-perjury policies. Review by this Court is required lest this technical inadvertence reduce the entire Title — and its Congressional purpose — to a dead letter at the whim of any prosecutor. Examination of the entirety of the Title's legislative history and scheme is required to determine if Congress intended an enactment so easily rendered meaningless and as to which each federal prosecutor holds a complete veto. That nullification of Congressional intent is the result arising from the conviction and its affirmance below. Detailed scrutiny of what Congress intended and did not intend is thoroughly justified in face of such a result. This cannot and should not be done in certiorari documents.

(b) In its zeal to argue the merits in this certiorari proceeding, the Government has totally ignored the practical dilemma that it imposes on this Court. For if the Court accepts the abbreviated history of Title IV given it by the Government, it is constructing a trap out of the two Federal perjury statutes. Any potential federal perjurer who is moved to recant promptly by the inducement of Section 1623(d) will be prosecuted under Section 1621. Certainly that was never intended by Congress. Yet that trap is precisely what the law creates, as the Government sees the law. For this reason alone benchmark review of these two statutes is essential.

¹ Now Section 1623 of Title 18, U.S.C.

(c) The Government's brief on the merits is not only abbreviated, it is misleading. Petitioner told the Court that no Court (and certainly not this Court) had dealt with the question of whether Section 1623 supplants Section 1621 in perjury arising in federal court or federal grand jury proceedings. It is clear that this Court has never faced this question but neither *U.S. v. Diggs*, 560 Fed.2nd 266, Cert denied 434 U.S. 925, C.A. 7, 1977, nor *U.S. v. Ruggiero*, 472 Fed.2nd 599, Cert denied 412 U.S. 939, "have ruled on the matter" in the circuit courts, as the Government contends (Gov. Opp. p. 7). In *Diggs*, the Seventh Circuit simply assumed that both 1623 and 1621 applied because the Defendant in *Diggs* never argued that they did not; nor could he, because his sole argument was that the two witness rule of Section 1621 was not complied with in his prosecution, an argument that he could not make while simultaneously arguing that 1623 applied. In *Ruggiero*, the Defendant never argued that 1623 supplanted 1621. Rather, he argued that when the prosecution chose 1623 (rather than 1621) it violated his constitutional rights because of 1623's lighter burden of proof. That constitutional argument is very different from the argument being made by Petitioner.

The closest that any Court has ever come to addressing the issue raised by this Petitioner came in the following succinct statement by the Second Circuit: *U.S. v. Kahn*, 472 F.2d 272; Cert. denied, 411 U.S. 982, C.A. 2, 1973.

"In response, the Government claims that Section 1623 did not repeal Section 1621, and that the prosecutor has the absolute discretion to choose which section an alleged perjurer will be tried under, and consequently what evidentiary rules will apply to

his trial. While it is clear that Section 1623, which applies only to Grand Jury and Court proceedings, did not wholly replace Section 1621, which covers oaths before any "competent tribunal, officer or person," we admit great skepticism about the second half of the government's argument. While perhaps Congress constitutionally could have placed such wide discretion in the prosecutor, we find no clear indication that it means to do so here, and we find not a little disturbing the prospect of the government employment of Section 1621 whenever recantation exists and Section 1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position."

If the Government is right (in its opposition), what disturbed the Second Circuit could become routine practice in the federal Courts. That it not what Congress intended. Certainly it is an important issue which has not been decided by this Court.

III.

The Government has also provided a brief synopsis of the law of recantation under Section 1621. It tells the Court that (assuming 1621 applies in this case) recantation, under federal perjury law goes only to the Defendant's intent at the time of the original false testimony. Again this snapshot of the merits is misleading.

In the forty-two years since this Court last gave careful scrutiny to recantation² at least two and possibly three separate federal doctrines have developed regarding its impact. The First, from the Ninth Circuit, holds that an immediate recantation causes:

²In *Norris v. U.S.*, 300 U.S. 564, 81 L.Ed. 805, 57 S.Ct. 535 (1937).

"the false statement and its withdrawal . . . to constitute one inseparable incident out of which contention to deceive cannot be drawn", *Llanos-Semarillos v. U.S.*, 177 F.2d, 164, 165 (C.A. 9, 1949).

This federal view of recantation is particularly relevant to the present petition. In it, the fact the immediacy of the recantation (made 40 seconds after the false testimony) is unique in the 140 year history of the crime; no recorded perjury conviction in the history of the crime followed such a recantation.

Another derives from the concept that immediate retraction (and the manifest of interference with the outcome of the judicial proceeding) deprives the episode of legal materiality. *Bechanstin v. U.S.*, 232 F.2d 1 (C.A. 5, 1956).

The third possible version of recantation, which the government contends is the only possible one is that it relates solely to defendant's state of mind at the time of utterance. While there is language in *Norris* to support such interpretation, the case itself does not so decide and none of the cases following *Norris* have so decided.

Thus this Court is faced with a variety of views even if it rejects application of Section 1623, and examines the federal law of recantation under 1621. The facts of the case makes review of these divergent rules a prudent exercise; if the decision below is allowed to stand, the immediacy of the recantation in *Tucker* will be clear precedent for elimination of recantations of any kind, made at any juncture, from federal perjury law, under Section 1621 as well as Section 1623.

IV.

The Government concludes with two additional points:

1. First, it all but concedes that the Sixth Circuit's opinion in this case was in error. There should be no doubt of this:

(a) The rationale used by that Court in affirming the conviction below never surfaced for one moment in the trial court, either before the Court or the jury.

(b) Assuming that the test used by the Sixth Circuit for validity of a recantation, to wit, whether:

"it . . . occurred under a threat that made it manifest that the falsity would be exposed"

is a jury question, petitioner was denied a jury trial on this issue. This denial alone justifies review by this Court.

(c) Assuming that the test used by the Sixth Circuit was the Section 1623 test (since the language used by the Court is Section 1623 language), the Court omitted one of the additional tests for recantation found in the statute; to wit, whether:

"at the time the admission is made, the" (false) declaration has not substantially affected the proceeding."

Since the *Tucker* recantation obviously could not and did not affect the bail proceeding in which it occurred, this omission is glaring.

2. The Government excuses all of the foregoing by stating:

". . . the fact that the court of appeals may have relied on the wrong reasons to reach the correct

result is not a reason for overturning its judgment." (Gov. Opp. 9)

The "correct result" – according to the Government – is obvious:

"since petitioner was properly prosecuted under Section 1621, and recantation is not a bar to prosecution pursuant to that section under any circumstance." (Gov. Opp. 11)

If that is the "correct result", it corrects nothing. No one, petitioner or the Government, has ever argued in any court that recantation is a "bar to prosecution" under Section 1621. The issue under Section 1621 that the Sixth Circuit viewed so erroneously was whether the recantation in this case was a *defense*, not whether it was a "bar to prosecution."

Thus, assuming that Section 1621 was properly used, the 40-second recantation in this case should have been reviewed by the Sixth Circuit under any of the recantation tests now used in federal courts. The Sixth Circuit could have applied the *Llanos-Semarillos* test, or the materiality test for this instantaneous recantation. It might have applied the simple intent test. Which test the Court would have chosen – no one will ever know.³ And then, whether the Sixth Circuit would have validated the recantation in this case under the particular test chosen by the Court – no one will ever know.

What might result from an examination by the Sixth Circuit of the *Tucker* recantation under any of the recantation tests available under Section 1621 is pure speculation. That speculation can never stand as a "correct result", exculpating manifest error. Pointedly, however, the Government's assertion that recantation can never be a "bar against prosecution" under Section 1621 is an irrelevancy and one with no legal support, beclouding the issue properly before the Sixth Circuit (that of recantation as a *defense* under Section 1621), compounding rather than excusing the manifest error of that court's decision.

V. CONCLUSION

Under any rule of law, recantation within one minute of false testimony, unique in the history of perjury under the federal statutes and at the common law, deserves the attention of this court. When that fact is coupled in the same case with prosecutorial nullification of major Congressional policy enacted in a statute never before reviewed by the Court, justification for review becomes more compelling. When circuit court review of that same

³The Government's contention that petitioner's position would "provide a windfall to witnesses whose perjury was quickly exposed (footnote 10, p. 11 Gov. Opp.) is totally misleading. A recantation under those circumstances is no defense under either Section 1621 or 1623; and that hypothesis is light years removed from the factual situation of *Tucker*.

case and that same statute is in plain error, scrutiny by this Court of the complete record below and the entirety of the legislative history of the affected statute manifestly serves the ends of justice.

Respectfully submitted,

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